

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Spencer Migotsky	Team: Squad #1	CCRB Case #: 201503326	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input checked="" type="checkbox"/> Injury
Incident Date(s) Tuesday, 04/28/2015 11:20 AM	Location of Incident: East 176th Street between Clay Avenue and Monroe Avenue	Precinct: 46	18 Mo. SOL 10/28/2016	EO SOL 10/28/2016	
Date/Time CV Reported Tue, 04/28/2015 12:45 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Tue, 04/28/2015 12:45 PM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Rafael Guzman	03491	934982	046 PCT
2. POM Gary Capellan	07470	950154	046 PCT
3. POM Rafael Perdomo	21268	942338	046 PCT
4. POM Adam Acosta	19747	946719	046 PCT
5. POM Carlos Pineda	07963	952118	046 PCT
6. An officer			046 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. SGT Kelvin Garcia	2599	936650	046 PCT
2. POM Ezequiel Burgos	00211	941471	046 PCT
3. POM Cesar Gomez	26485	941024	046 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Gary Capellan	Abuse: PO Gary Capellan stopped § 87(2)(b)	
B.POM Gary Capellan	Force: PO Gary Capellan restricted § 87(2)(b)'s breathing.	
C.POM Gary Capellan	Discourtesy: PO Gary Capellan spoke discourteously to § 87(2)(b)	
D.POM Gary Capellan	Force: PO Gary Capellan used physical force against § 87(2)(b)	
E.POM Gary Capellan	Abuse: PO Gary Capellan damaged § 87(2)(b)'s property.	
F.POM Gary Capellan	Abuse: PO Gary Capellan searched § 87(2)(b)	
G. An officer	Force: An officer used physical force against § 87(2)(b)	
H.POM Gary Capellan	Abuse: PO Gary Capellan threatened § 87(2)(b) with the use of force.	
§ 87(2)(g), § 87(4-b)		
§ 87(2)(g), § 87(4-b)		
§ 87(2)(g), § 87(4-b)		
§ 87(2)(g), § 87(4-b)		

Officer(s)	Allegation	Investigator Recommendation
§ 87(4-b), § 87(2)(g)		

Case Summary

This case was delayed due to difficulties with officer identification. The officer descriptions that § 87(2)(b) provided (uniformed) were inconsistent with the officers' assignment (SNEU is generally in plainclothes). Additionally, there was an overall lack of documentation of the stop excepting PO Capellan's memo book entry. There was no stop and frisk report, arrest, summons, SPRINT, or warrant check.

On April 28, 2015 at approximately 11:20 am, PO Adam Acosta and PO Carlos Pineda were assigned to a 46th Precinct Street Narcotics Enforcement Unit observation post on the roof of 125 Mt. Hope Place in the Bronx. Either PO Acosta or PO Pineda relayed a description of a male Hispanic wearing a green hoodie and a green and yellow jacket walking east on 176th Street to the chase team saying that he was involved in a hand-to-hand drug transaction. PO Gary Capellan, PO Rafael Guzman, and PO Rafael Perdomo also of the 46th Precinct were assigned to the chase team.

§ 87(2)(b) was walking on 176th Street between Clay Avenue and Monroe Avenue wearing a lined gray and green hoodie, a green long sleeved shirt, a green hat with the brim turned backwards, a small pouch hanging diagonally under his shirt, a black and gray winter vest, and green glasses when PO Capellan stopped him (**Allegation A**). PO Capellan allegedly placed § 87(2)(b) in a bear hug and § 87(2)(b) threw his elbows back a little in an attempt to get PO Capellan off him but he was unable to move much. § 87(2)(b) had trouble breathing and told PO Capellan "why are you grabbing me so hard, I'm starting not to breathe" (**Allegation B**). PO Guzman pulled at § 87(2)(b)'s left wrist. None of the police officers identified themselves as such but by this point § 87(2)(b) understood that they were members of the NYPD because they were dressed in uniform. § 87(2)(b) asked why PO Guzman was pulling on his hand and PO Capellan allegedly said "shut the fuck up" (**Allegation C**).

PO Capellan allegedly slammed § 87(2)(b) against a wall, which caused a bruise to his head and his glasses to break (**Allegation D** and **Allegation E**). PO Capellan searched § 87(2)(b) by putting his hands in § 87(2)(b)'s vest and pants pockets as well as in his pouch (**Allegation F**). § 87(2)(b) asked why the officers stopped him and was told that he fit a description for a man with a green hoodie. Once everything was emptied out of § 87(2)(b)'s pockets, he was released.

An officer – § 87(2)(b) did not know who – allegedly slapped § 87(2)(b) on the head while things were being removed from his pockets (also **Allegation G**). § 87(2)(b) talked back to him and PO Capellan allegedly said "if you don't shut up, I'll beat you up" (**Allegation H**). § 87(2)(b) pointed out that there were bystanders watching and PO Capellan allegedly said "the next time we're going to fuck you up" and "get the fuck off the street" (also **Allegation C** and also **Allegation H**). § 87(2)(b) said "I'm gonna get you back" and PO Capellan allegedly said "you aren't gonna do shit" (also **Allegation C**). § 87(2)(b) did not request medical treatment because the officers left before he could ask.

§ 87(2)(b) was not issued a summons or arrested. He obtained medical treatment on his own on § 87(2)(b) at § 87(2)(b) Hospital. § 87(2)(b) was diagnosed with a non-serious head injury.

[illegible]

- This is the second complaint filed by § 87(2)(b). His first complaint was withdrawn and is unrelated to this complaint (Board Review 01).
- PO Capellan has been a member of the NYPD for four years and has three previous CCRB allegations in two previous cases. All of his prior allegations were closed as complainant uncooperative and § 87(2)(g).

§ 87(2)(b) stated that the officer who first stopped him was the same as the officer who caused him to have difficulty breathing, said “shut the fuck up,” “get the fuck off the street,” and “you aren’t gonna do shit,” slammed him against a wall, broke his glasses, and said “if you don’t shut up I’ll beat you up” and “the next time we’re going to fuck you up” (Board Review 08). PO Capellan acknowledged that he was the officer who stopped § 87(2)(b) (Board Review 05). Therefore, **Allegations A, B, C, D, E, and H** are pleaded against PO Capellan.

§ 87(2)(b) stated that he did not know which of the three officers who stopped him slapped him on the head (Board Review 08). No officer present admitted to this action or testified that they saw another officer slap § 87(2)(b) (Board Review 04, 05, 06). As a result, **Allegation G** is pleaded against an officer.

Recommendations

Allegations Not Pleaded

PO Capellan stated that before he searched § 87(2)(b) he frisked him by patting down § 87(2)(b)'s pants pockets. § 87(2)(b) did not allege that anyone frisked him so this allegation was not pleaded.

Allegations Pleaded

Allegation A: Abuse of Authority – PO Gary Capellan stopped § 87(2)(b)

It is undisputed by the officers and by § 87(2)(b) that PO Capellan stopped § 87(2)(b). PO Capellan's memo book stated that he received a description of a male Hispanic wearing a green hoodie and a green and yellow jacket going East on 176th Street from the observation post (Board Review 05). § 87(2)(b) stated that he was wearing a lined gray and green hoodie, a green long sleeved shirt, a green hat with the brim turned backwards, a small pouch hanging under his shirt, a black and gray winter vest, and green glasses on the day of the incident (Board Review 08 and 14-19). PO Capellan testified that an officer assigned to the observation post stated that he observed § 87(2)(b) engaged in a hand-to-hand drug transaction (Board Review 05).

In the case *New York v. Powell*, the court cites the fellow-officer rule which states that "if an arresting officer lacks personal knowledge sufficient to establish probable cause, the arrest will be lawful if the officer acts upon the direction of or as a result of communication with a superior or fellow officer or another police department, provided that the police as a whole were in possession of information sufficient to constitute probable cause to make the arrest" (Board Review 09). § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Allegation B: Force – PO Gary Capellan restricted § 87(2)(b)'s breathing.

§ 87(2)(b) stated that he was walking on 176th Street between Clay Avenue and Monroe Avenue when he was approached by PO Capellan from behind. He did not see any police officers prior to interacting with PO Capellan. According to § 87(2)(b) PO Capellan wrapped his arms around § 87(2)(b)'s chest, which restricted his breathing. § 87(2)(b) told PO Capellan "why are you grabbing me so hard, I'm starting not to breathe" (Board Review 08).

PO Capellan stated that he told § 87(2)(b) that he needed to talk to him when the officers pulled up alongside § 87(2)(b) and that § 87(2)(b) did not stop, looked at PO Capellan, and then quickened his pace. PO Capellan, PO Perdomo, and PO Guzman were in uniform in a marked RMP. § 87(2)(b) did not say anything to the officers and put his hands into his pockets. PO Capellan exited his vehicle, jogged over to § 87(2)(b) and grabbed his wrists from behind. PO Capellan explained that he did not want § 87(2)(b) to take his hands out of his pockets because he did not know what § 87(2)(b) had inside his pockets. PO Capellan was concerned that § 87(2)(b) may have had a needle or that he was reaching into his pockets to get rid of any narcotics he possessed. PO Capellan attempted to keep § 87(2)(b) from discarding narcotics by grabbing

his wrists firmly and holding them in place. He denied that he placed § 87(2)(b) in a bear hug or that he wrapped his arms fully around § 87(2)(b) and he denied that § 87(2)(b) complained of a restriction of his breathing. There was no indication to PO Capellan that § 87(2)(b) had trouble breathing and PO Capellan denied that § 87(2)(b) said he was grabbing him so hard that he could not breathe (Board Review 05).

PO Perdomo stated that PO Capellan told § 87(2)(b) to stop walking when they first encountered him and that he continued to walk. Since § 87(2)(b) did not listen to PO Capellan's order, PO Capellan exited their marked vehicle and stopped § 87(2)(b) by holding his wrists firmly at his sides from behind. § 87(2)(b) did not complain of any restriction of breathing, say that he could not breathe, or appear to have trouble breathing. There was no indication to PO Perdomo that § 87(2)(b) could not breathe because he was screaming and cursing throughout the interaction (Board Review 04).

PO Guzman did not recall the incident (Board Review 06).

§ 87(2)(g)
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§ 87(2)(g).

Allegation C: Discourtesy – PO Gary Capellan spoke discourteously to § 87(2)(b)

§ 87(2)(b) stated that when he was stopped and placed in a bear hug by PO Capellan, PO Guzman pulled on his hand. § 87(2)(b) then asked PO Guzman why he was pulling on his hand and PO Capellan said “shut the fuck up.” § 87(2)(b) also stated that at the end of the incident he talked back to the officers and PO Capellan replied “the next time we’re going to fuck you up” and “get the fuck off the street.” § 87(2)(b) then told PO Capellan “I’m gonna get you back” and PO Capellan said “you aren’t gonna do shit” (Board Review 08).

PO Perdomo did not recall any officer saying “shut the fuck up” and denied that any officer said “the next time we’re going to fuck you up” or “get the fuck off the street.” PO Perdomo denied that any officer used any profanity (Board Review 04). PO Capellan denied that he said “shut the fuck up,” “the next time we’re going to fuck you up,” or “get the fuck off the street.” He denied using any profanity (Board Review 05). PO Guzman did not recall the incident or any of the alleged remarks (Board Review 06).

§ 87(2)(g)
§ 87(2)(g)
§ 87(2)(g).

Allegation D: Force – PO Gary Capellan used physical force against § 87(2)(b)

Allegation E: Abuse of Authority – PO Gary Capellan damaged § 87(2)(b)'s property.

According to § 87(2)(b) after PO Capellan grabbed him from behind, PO Capellan slammed him into a wall, which caused a bruise to his head and his glasses to break. PO Capellan then pinned § 87(2)(b) against the wall. § 87(2)(b) stated that he was struggling by throwing his

elbows back in an attempt to get PO Capellan off him because he did not know why he was being grabbed, but he was unable to move much (Board Review 08). § 87(2)(b)'s medical records from § 87(2)(b) and a photo of a minor injury to § 87(2)(b)'s head corroborate that § 87(2)(b) sustained an injury to his head, however the photo, which was taken one day after the incident, did not appear to show a fresh injury (Board Review 10 and 18). A statement that § 87(2)(b) gave to the hospital is consistent in that § 87(2)(b) claimed that "cops hit my head against the wall." § 87(2)(b) brought the broken green glasses he was wearing during the incident to his interview and a photo of them was taken (Board Review 11 and 17).

PO Perdomo stated that he saw PO Capellan escort § 87(2)(b) to a wall after grabbing his wrists and that § 87(2)(b) was struggling with PO Capellan. He stated that PO Capellan placed § 87(2)(b) chest forward against a wall while standing behind him and continuing to hold his arms. He denied that PO Capellan pushed § 87(2)(b) against a wall. § 87(2)(b) never complained of being pushed against a wall or of any injuries. PO Perdomo did not recall § 87(2)(b) wearing glasses and when he was shown the photo of § 87(2)(b)'s glasses he said he "would remember that." PO Perdomo denied that any officer broke § 87(2)(b)'s glasses during the incident (Board Review 04).

PO Capellan did not recall whether § 87(2)(b) was placed against a wall or whether § 87(2)(b) was slammed or pushed against a wall. PO Capellan also did not recall whether § 87(2)(b) was wearing glasses. He was shown a picture of § 87(2)(b)'s glasses but this did not help refresh his recollection. PO Capellan denied that any officer pushed § 87(2)(b) against a wall causing him to break his glasses and denied that any officer caused § 87(2)(b)'s glasses to break (Board Review 05).

§ 87(2)(g)
[REDACTED]

Allegation F: Abuse of Authority – PO Gary Capellan searched § 87(2)(b)

§ 87(2)(b) stated that when he was pinned against the wall, he was searched. He said that his vest and pants pockets were searched and that a pouch that he was wearing was also searched. Everything was emptied out of his pockets (Board Review 08). PO Perdomo stated that § 87(2)(b) was placed against a wall and then patted down by PO Capellan (Board Review 04). PO Capellan stated that he went into § 87(2)(b)'s outermost pockets to check for drugs. He did not see that § 87(2)(b) had a pouch during the search. PO Capellan told § 87(2)(b) that he would have to check him after stopping him and then frisked and searched him. He explained that he patted down § 87(2)(b)'s pants pockets and felt hard objects. PO Capellan did not know what those objects were but said that they were small. He believed that they could have been narcotics

in some type of packaging such as heroin in a glassine. PO Capellan went into § 87(2)(b)'s pockets and took out keys and napkins. He did not recall which pocket he found those objects in. PO Capellan searched § 87(2)(b)'s front and back pockets as well as his wallet. He did not check § 87(2)(b)'s upper body pockets and he did not recall seeing or searching § 87(2)(b)'s pouch, even when he was shown a picture of § 87(2)(b) wearing it. The search yielded negative results (Board Review 05).

§ 87(2)(g)

§ 87(2)(g) principle expounded on in *People v. Reid*. In that case, the Court of Appeals of New York stated that “a search must be incident to an actual arrest, not just to probable cause that might have led to an arrest but did not” and that “where no arrest has yet taken place, the officer must have intended to make one if the ‘search incident’ exception is to be applied” (Board Review 20). § 87(2)(g)

Allegation G: Force – An officer used physical force against § 87(2)(b)

§ 87(2)(b) did not know which of the three officers he interacted with slapped him on the head and no officer who was involved in this interaction admitted to slapping him on the head or stated that they saw an officer slap § 87(2)(b) on the head (Board Review 08). § 87(2)(g)

Allegation H: Abuse of Authority – PO Gary Capellan threatened § 87(2)(b) with the use of force.

According to § 87(2)(b) as he was being searched he talked back to the officers and PO Capellan said “if you don’t shut up, I’ll beat you up” and “the next time we’re going to fuck you up” (Board Review 08). PO Perdomo stated that § 87(2)(b) said “fuck you” to the officers while he was being held against a wall. He denied that any officer said “if you don’t shut up, I’ll beat you up” or “the next time we’re going to fuck you up.” More generally, he denied that any officer said that they would use physical force against § 87(2)(b) (Board Review 04). PO Capellan corroborated that § 87(2)(b) was talking back to the officers and that § 87(2)(b) called him a

“fucking pig,” however, he denied that PO Capellan denied that he said “if you don’t shut up I’ll beat you up” or “the next time we’re going to fuck you up” (Board Review 05).

§ 87(2)(g)

§ 87(2)(g), § 87(4-b)

§ 87(2)(g), § 87(4-b)

Squad: 1

Investigator: _____
Signature Print Date

Squad Leader: _____
Title/Signature Print Date

Attorney: _____
Title/Signature Print Date